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TO: Service List in D.T.E. 04-33

DATE: July 7, 2006

RE: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order - D.T.E. 04-33

I. INTRODUCTION

On July 14, 2005, December 16, 2005 and May 5, 2006, respectively, the Department of Telecommunications and Energy ("Department") issued its Arbitration Order, Reconsideration Order, and Compliance Order in D.T.E. 04-33 (collectively, "Arbitration Orders"). Pursuant to the Arbitration Orders, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"), Conversent Communications of Massachusetts, Inc. ("Conversent"), DSLnet Communications, LLC, RCN-BECoCom LLC ("RCN-BECo"), RCN Telecom Services of Massachusetts, Inc. ("RCN Telecom"), and the Competitive Carrier Group[1] jointly filed on May 26, 2006 an Amendment ("Joint Amendment") for the Department's review and approval.

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[1] The Competitive Carrier Group includes: A.R.C. Networks Inc. d/b/a InfoHighway Communications; DIECA Communications Inc. d/b/a Covad Communications Company ("Covad"); and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.) ("XO").

Additionally, on June 8, 2006, Verizon filed revisions to M.D.T.E. Tariff No. 17 ("Tariff No. 17") in compliance with the Department's Arbitration Orders. On June 21, 2006, comments on Verizon's tariff revisions were filed by Covad, Conversent, CTC Communications Corporation ("CTC"), individually, and by RCN-BECo and RCN Telecom ("RCN"), jointly. On June 26, 2006, Verizon, XO and Conversent filed reply comments. In this Letter Order, the Department reviews the Joint Amendment and Verizon's proposed revisions to Tariff No. 17.

II. COMPLIANCE AMENDMENT

After review and consideration, the Department determines that the Joint Amendment conforms to the Department's directives in its Arbitration Order, Reconsideration Order, and Compliance Order. Accordingly, the Department hereby approves the Joint Amendment. Each executed Amendment shall be filed with the Department and shall govern the parties' relationship in Massachusetts.

III. COMPLIANCE TARIFF

A. Positions of the Parties

1. Covad

Covad argues that Verizon has failed to incorporate into its proposed tariff the Department's rulings that preclude nonrecurring charges ("NRCs") for routine network modifications ("RNMs") necessary to provision DS1 high capacity loops (Covad Comments at 1). Covad argues that, in its tariff, Verizon is attempting to apply unilaterally the loop conditioning charges related to provisioning of DSL-compatible loops (i.e., DS0 loops) to DS1 loops (id. at 2 and n.7).

Covad argues that, in the arbitration proceeding, the Department declined to consider Verizon's proposed charges for RNMs because Verizon chose to defer submitting a supporting cost study (id. at 3). Therefore, according to Covad, Verizon's proposed tariff directly contradicts the Department's orders which expressly prohibit such NRCs for RNMs (id.). As such, Covad argues that the Department should order Verizon to submit additional tariff revisions deleting these charges (id. at 4).

2. Conversent

Conversent argues that several provisions in Verizon's proposed tariff fail to reflect the Department's rulings (Conversent Comments at 1). For example, Conversent argues that the tariff provisions regarding audits of EEL eligibility contradict the Department's determinations that "materiality" of noncompliance was to be determined by the independent auditor (id.

at 2-3). Further, Conversent argues that Verizon's tariff provisions improperly describe the costs that a non-prevailing party must pay (id. at 3). In addition, Conversent argues that, in the arbitration, the Department determined that Verizon should re-price a non-compliant EEL at the lowest rate the CLEC otherwise could have obtained for the substitute facility; however, Verizon's proposed tariff allows Verizon to re-price the facility at rates equivalent to an analogous service or arrangement (id. at 4).

In addition, Conversent argues that Verizon's proposed tariff would allow Verizon to impose late fees in addition to requesting "carrying charges" (such as interest) which is inconsistent with the Department's ruling that late fees are prohibited (id. at 4). Further, Conversent argues that Verizon's tariff does not reflect the appropriate rate for an analogous or substitute service for dark fiber transport if Verizon ultimately prevails in a "provision-then-dispute" situation (id. at 5). Verizon's tariff, argues Conversent, does not limit Verizon to charge only the lowest rate the CLEC could have obtained in the first instance had the CLEC not ordered the facility as an unbundled network element ("UNE"), as the Department required (id.).

Further, Conversent argues that there a number of other provisions in Verizon's tariff to which Verizon should have proposed revisions in order to be compliant with the Department's orders, but Verizon did not do so (id. at 6). Specifically, Conversent argues that the tariff revisions should make clear that for a regular unbundled DS1 or DS3 loop or dedicated transport circuit, no charge is permitted for RNMs (id.). In addition, Conversent argues that the language "other applicable law" must be included in the section of the tariff on commingling (id. at 7-8). This was a disputed issue and the inclusion of the language in the amendment was the result of a conference call among the parties and Department Staff (id. at 8). Finally, Conversent argues that Verizon's tariff includes the term "fiber to the premises loop" although the Department expressly rejected that term in the arbitration because it did not accurately reflect the FCC's rules (id.).

In its reply comments, Conversent supports Covad's point that Verizon's proposed tariff is inconsistent with the Department's ruling that no charges are permitted for RNMs on UNE DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, and dark fiber transport (Conversent Reply Comments at 1).

3. CTC

CTC argues that Verizon's tariff is unacceptable and requires revisions for several reasons (CTC Comments at 1). First, CTC argues that Verizon's tariff revision regarding EEL recertification will retroactively impose (i.e., from January 15, 2006, forward) increased rates on CLECs and is therefore impermissible under state law (id. at 2). CTC argues that this provision defies the prohibition on retroactive ratemaking and that the Department can allow Verizon to assess increased rates only on a going forward basis (id. at 2-3). CTC further

argues that the filed rate doctrine forbids Verizon from retroactively changing tariffed rates, terms and conditions for EELs because the related provisions of Verizon's compliance tariff had neither been published or filed at the time from which Verizon seeks to impose the charges (id. at 3-4).

Further, CTC argues that any aspects of Verizon's proposed tariff that are inconsistent with the FCC's ruling on the XO Forbearance Petition[2] should not be allowed to go into effect (id. at 4). CTC argues that in the absence of an FCC denial of the petition, forbearance will be deemed granted on June 25, 2006 (id. at 5). CTC argues that if the forbearance petition is granted (or if it goes into effect by operation of law), the Department should not permit any parts of Verizon's proposed tariff that are inconsistent with this outcome to go into effect (id.). To do otherwise, argues CTC, would be inconsistent with the savings clauses of §§ 251(d)(3), 252(e)(3), and 261 that preserve the Department's authority to render decisions that are consistent with the Telecom Act and the FCC's rules (id.).

4. RCN

In its comments, RCN argues that Verizon's tariff must be modified because the tariff does not clarify that dedicated transport remains available for interconnection purposes even though it may not be available on an unbundled basis pursuant to the FCC's § 251(c)(3) unbundling regulations (RCN Comments at 4). RCN argues that a new section should be added to the tariff which states that transport facilities are available as interconnection facilities at TELRIC-based rates (id. at 5). RCN further argues that the Department should reject Verizon's objections to this clarification (id. at 6). RCN argues that it is necessary that the Department make this clarification because the terms for interconnection facilities are needed by CLECs that previously had relied upon the availability of the entrance facility and other dedicated transport UNEs for interconnection and that RCN's proposed clarification is a straightforward implementation of the Telecom Act and has been adopted by numerous state commissions that have decided the issue (id. at 9-10).

5. Verizon

In its reply comments, Verizon states that, for the most part, the CLECs raise arguments that the Department should reject (Verizon Reply Comments at 1). With regard to RCN's arguments regarding interconnection facilities, Verizon argues that the Department has already rejected RCN's argument in the arbitration by stating that there is no need for the

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[2] On March 28, 2005, XO and other CLECs filed a petition with the FCC seeking forbearance from application of the FCC's rules applying (1) the eligibility criteria for the use of EELs, (2) the ten DS1 dedicated transport cap, and (3) the wire center-based test for DS1 loop impairment to "predominantly residential" and "small office" buildings (CTC Comments at 4-5).

parties to amend their ICAs with respect to interconnection facilities (id. at 2). However, for clarification purposes, Verizon will agree to inserting language in its tariff that states that the discontinuation of unbundled entrance facilities does not alter carriers' preexisting rights and responsibilities concerning interconnection facilities (id. at 3).

In response to CTC's arguments regarding retroactive ratemaking and the filed rate doctrine, Verizon argues that because the Department ordered Verizon to file a compliance tariff consistent with the arbitration orders, the date of January 15, 2006, for EEL recertification is proper and should be approved (id. at 3-4). Verizon argues that it is not proposing new rates in its tariff nor proposed applying its rates retroactively; rather, Verizon argues that it is merely implementing the Department's rulings (id. at 4). Verizon argues that CTC's proposal would create preferential treatment for those CLECs that purchase out of the tariff and is not good policy (id.). Verizon further argues that CTC's arguments regarding the XO Forbearance Petition are moot given that XO and the other CLECs withdrew the petition on June 23, 2006 (id. at 3 n.2).

In addition, Verizon argues that the Department should reject Conversent's request that "other applicable law" be included in the tariff's commingling provision, because, while that language is included in the ICA amendment, it should not be included in the tariff (id. at 5). Verizon argues that because the tariff only applies to services available under Section 251, it would be anomalous to expand one particular section of the tariff to cover "other applicable law" (id. at 6). Further, Verizon argues that adding "other applicable law" to the tariff is not necessary to implement the FCC's Triennial Review Order or Triennial Review Remand Order (id.). Moreover, Verizon argues that including the term in the tariff would render the tariff vague and confusing because there is no other law that requires Verizon to provide access to unbundled elements (id. at 7).

Verizon also proposes further revisions to its proposed tariff revisions in response to certain CLECs comments (id. at 7). Specifically, Verizon suggests modifying the tariff language concerning the following: (1) audits of EEL eligibility criteria; (2) the rates that would apply if an EEL becomes non-compliant; (3) the charges that would apply if Verizon prevails in a "provision-then-dispute" situation; (4) the rates for dark fiber when Verizon prevails in a "provision-then-dispute" situation; (5) use of the term "fiber to the premises;" and (6) the charges for RNMs (id. at 7-10).

6. XO

In its reply comments, XO supports Covad's comments, in which Covad argued that Verizon's tariff fails to incorporate express Department rulings regarding nonrecurring costs for NRMs (XO Reply Comments at 1). XO argues that the Department should order Verizon to submit additional revisions to its tariff, deleting the nonrecurring charges for RNMs because the proposed charges directly contradict the Department's orders (id. at 1-2).

B. Analysis and Findings[3]

1. Provision-Then-Dispute

In response to Conversent's concerns regarding the charges that would apply if Verizon prevails in a provision-then-dispute situation in its Reply Comments, Verizon proposes to further modify Part B, §§ 2.1.1.D.2, 2.1.1.E.1, 5.3.1.D.2, and 5.3.1.E.1 by the adding to the end of each section: "Late payments shall not apply to any back-billed amounts" (Verizon Reply Comments at 7). Additionally, Verizon proposes to further modify the tariff language in Part B, § 17.1.1.E.1 to state that when Verizon prevails in a dispute regarding dark fiber and has met the notification requirements, Verizon may backbill the amount of the difference between the applicable UNE rate and "the lowest rate that the TC could have otherwise obtained for an analogous arrangement had the TC not ordered such arrangement as a UNE" (id. at 8). The Department determines that the additional modifications to Tariff No. 17 proposed by Verizon its reply comments are consistent with the Department's Arbitration Orders in this proceeding and fully addresses Conversent's concerns regarding the appropriate charges that apply in "provision-then-dispute" situations. Accordingly, the Department approves the proposed modifications to the tariff language contained in Verizon's Reply Comments.

2. Fiber to the Premises

In the Arbitration Order, the Department acknowledged that Verizon's use of the terms "fiber to the premises loop" and "FTTP," which appear nowhere in the federal rules, had the potential to cause some confusion. Arbitration Order at 177. As a consequence, the Department required Verizon to drop the terms "fiber to the premises" and "FTTP" and confine itself to the terms used in the federal rules. With respect to Verizon's use of the term "fiber to the premises loop" in the tariff, we find that the revision to Part B, Section 5.0.1.A proposed by Verizon in its Reply Comments, which replaces the term "fiber to the premises" and "FTTP" with the FCC-standard terms "fiber to the curb" ("FTTC") and "fiber to the home" ("FTTH"), is fully responsive to Conversent's concerns.

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[3] Given the withdrawal on June 23, 2006, CTC's arguments regarding the XO Forbearance Petition are moot and are not addressed herein. Additionally, we recognize that the CLECs had an abbreviated time period to review and comment on the compliance of the revisions proposed by Verizon to Tariff No. 17. We note, however, that should a CLEC discover additional provisions in the tariff that they believe are non-compliant with our Orders in this docket, a complaint pursuant to G.L. c. 159, § 14 may be filed.

3. Dedicated Transport

In response to RCN's concerns that the tariff should specify that entrance facilities, including dedicated transport, remain available for interconnection purposes so that CLECs may interconnect with Verizon's network for the transmission and routing of telephone exchange service and exchange access service pursuant to § 251(c)(2), Verizon offered a further modification to its tariff which states that discontinuance of unbundled entrance facilities does not alter carriers' preexisting rights and responsibilities concerning interconnection facilities (see Verizon Reply Comments at 3). We find that this further modification is consistent with the Department's earlier determinations in this proceeding with respect to interconnection facilities and does not limit CLECs' access to tariffed interconnection facilities at TELRIC rates, and terms and conditions unchanged by the Triennial Review Order[4] and the Triennial Review Remand Order[5]. Although we do not adopt RCN's preferred language, we note, for purposes of avoiding future disputes between Verizon and CLECs, that our adoption of Verizon's revised language, as well as our findings in the Arbitration Orders, reflects our determination that, although entrance facilities, including dedicated transport, are no longer available as UNEs, they remain available to CLECs at TELRIC rates for interconnection under § 251(c)(2).

4. Applicable Law

We agree with Verizon's argument that a reference to other applicable law is inappropriate in Part B, § 1.1.1.A.1 of Tariff No. 17. Nevertheless, the ability of a CLEC to obtain UNEs pursuant to other applicable law (i.e., a source other than Tariff No. 17), or to commingle such UNEs with wholesale services, is not impeded by the omission of the requested reference. Rather, the omission of the reference merely acknowledges the limited scope of Tariff No. 17 to the requirements of § 251 of the Act.

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[4] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 01-36 (rel. Aug. 21, 2003) ("Triennial Review Order"), vacated in part and remanded in part by United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

[5] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) ("Triennial Review Remand Order").

5. EELs

Conversent raises objections to certain language concerning terms and conditions for EEL audits in § 13.4, and the rates that will apply if an EEL becomes non-compliant in § 13.3.1.B. In response, Verizon proposed certain further modifications to its tariff language (see Verizon Reply Comments at 7-8). Concerning the disputed EEL audit provisions, Verizon's proposed modifications address most of the specific concerns raised by Conversent. However, we note that this dispute could have been avoided by Verizon simply carrying over to the tariff the language verbatim from § 3.11.2.6 of the Amendment. Verizon's tariff language, even with the modifications, differs through omission or addition of language compared to the provisions in the Amendment. Although we did not require Verizon to mirror the Amendment language to the word, in this case we see no reason why the tariff language should be different and why the Amendment language can not be included in the tariff verbatim. Thus, we require Verizon to replace the proposed tariff language with the provisions contained in § 3.11.2.6 of the Amendment, except for cross references. Regarding the disputed language for the rates that will apply if an EEL becomes non-compliant, we find that Verizon's proposed additional language responds to Conversent's objection.

6. Routine Network Modifications

In response to CLEC arguments that Verizon's tariff improperly assesses charges for RNMs for DS1 and DS3 high-capacity loops and transport and dark fiber transport, in violation of the Arbitration Orders, Verizon proposes to revise Part M, § 1.3.1 of Tariff No. 17 "to make explicit that the Department-approved rates for removal of load coils or bridged tap apply to DS-0 loops only and that rates for removing load coils or bridged tap on DS-1 loops are still to be determined" (Verizon Reply Comments at 9-10). We find that with this modification to Verizon's proposed language, the provision is in compliance with our findings in the Arbitration Orders, and it is so approved. Although not stated in the tariff, for avoidance of doubt, charges for RNMs for DS3 loops and high-capacity transport and dark fiber transport may not be assessed until such rates are established by the Department.

7. Retroactivity of the Tariff

CTC argues that Verizon's tariff retroactively imposes new rates from January 15, 2006 for existing EELs that were not recertified by that date, and therefore violates the filed rate doctrine and the prohibition on retroactive ratemaking. Verizon counters that that date was established in the arbitration and is included in the Amendment, and as such, "Verizon is merely implementing the rulings made by the Department in this proceedings." While the Department established January 15, 2006 as the deadline for recertification of EELs in the Amendment, we do not find it appropriate for rates for a tariffed offering be applied retroactively. We find that the recertification deadline for existing EELs taken under the tariff, for CLECs that have not already recertified, shall be 30 days from the effective date of the

tariff. This deadline applies only to carriers that take service under the tariff and not the carriers whose ICAs are to be amended as a result of this arbitration.

IV. ORDER

The Department hereby approves the Joint Amendment and directs the parties to submit a copy of the executed Amendments to the Telecommunications Division of the Department. Additionally, the Department hereby approves the proposed revisions to Tariff No. 17, subject to the additional modifications discussed in this Order. Verizon is directed to file a revised tariff, for immediate effect, within seven (7) days of the date of this Order.

By Order of the Department,

/s/
Judith F. Judson, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Brian Paul Golden, Commissioner